U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 13 2007
SRC 06 113 50854

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is an engineering consulting firm. It seeks to employ the beneficiary permanently in the United States as a project engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, while the director's analysis would have been sound in most cases, we concur with counsel that the organization of the petitioner as a personal services corporation, the large profits distributed to the officers and the number of years of operations are favorable considerations that should have been taken into account.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on December 12, 2005. The proffered wage as stated on the ETA Form 9089 is $54,787 annually. On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of June 2001.

On the petition, the petitioner claimed to have an establishment date in 1982, a gross annual income of $4,000,000, a net income of $3,200,000 and 40 employees. In support of the petition, the petitioner submitted the beneficiary's 2005 Form W-2 Wage and Tax Statement and 2006 pay stubs. These documents reflect the petitioner paid the beneficiary $41,963.88 in 2005 and $1,655.77 biweekly in January and February 2006. The petitioner also submitted its 2004 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return. In box A, the petitioner checked that it was a personal service corporation.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 8, 2006, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its tax returns for 2002, 2003 and 2005. All of the returns were filed as a personal service corporation. Counsel noted that the petitioner has been in business for 24 years and asserts that the president and owner of the petitioner "could simply elect to distribute additional funds towards the wages of the beneficiary from her compensation to meet the proffered wage." Counsel discusses the tax laws regarding personal services corporations and cites *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that the director should consider the totality of the circumstances in determining a petitioner's ability to pay the proffered wage. Counsel also referenced a 2004 non-precedent decision by this office rendering a favorable decision on another case involving a personal service corporation.

The tax returns reflect the following information for the following years:

	2002	2003	2004	2005
Gross income	$2,978,165	$3,840,480	$4,060,343	$3,911,637
Net income	($56,293)	$79,263	$0	($19,661)
Compensation of officers	$843,017	$422,192	$851,517	$1,019,999
Sole owner's share	$243,910	$240,000	$429,989	$519,999
Current Assets	$58,477	$113,235	$30	$2
Current Liabilities	$163,425	$105,840	$119,751	$153,750
Net current assets	($104,948)	$7,395	$119,721	($153,748)

In addition, counsel submitted copies of the beneficiary's pay stubs for March through May reflecting biweekly wages of $1,655.77. The petitioner also submitted a letter from its president expressing a willingness to pay the difference between the proffered wage and the wages paid from her own share of the company's profits.

The director correctly noted that non-precedent decisions by this office are not binding and noted that wages paid to officers are no longer available to pay the proffered wage. Thus, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 1, 2006, denied the petition.

On appeal, counsel references the non-precedent decision submitted in response to the director's request for additional evidence and asserts that the director violated the equal protection clause of the U.S. Constitution by treating like cases differently. Each case must be decided on a case-by-case basis on the evidence of record. Non-precedent decisions are not typically written with sufficient specificity to allow a comparison with the facts of another case.

In addition, counsel implies that while the decision by this office on which counsel relies may not have been issued as a binding precedent, it should be followed because it was not appealed to the Board of Immigration Appeals. Counsel provides no legal authority, and we know of none, that would allow a Service Center director to appeal decisions by this office to the Board of Immigration Appeals. The failure of the director to take an unauthorized action relating to a non-precedent decision has no relevance to the importance of that decision. To hold otherwise would be to find that every AAO decision is a de facto precedent. The regulation at 8 C.F.R. § 103.3(c), however, asserts that only designated decisions serve as binding precedents.

While counsel's constitutional and procedural assertions are not persuasive, we are persuaded by his analysis of the facts in this matter.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2005 or during the first five months of 2006. In 2005, the petitioner paid the beneficiary $41,963, or $12,823.12 less than the proffered wage. The biweekly proffered wage is $2,107.19, or $451.42 less than the biweekly wages paid from January 2006 through May 6, 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets.

We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid the full proffered wage in 2005. In that year, the petitioner shows a net loss on line 28 of its tax return and negative net current assets. Thus, the director correctly determined that the petitioner has not demonstrated the ability to the difference between the wage paid and the proffered wage out of its net income or net current assets.

The director's refusal to consider the amounts used to compensate the petitioner's officer would typically be justified. The director correctly stated that money expended by the company, including on wages, is no longer available to pay the proffered wage. Nevertheless, the petitioner, has presented a plausible argument, fully consistent with the evidence, to demonstrate that peculiarities in the tax code create a unique circumstance for personal service corporations, as designated on the IRS Form 1120.

As in *Matter of Sonegawa*, 12 I&N Dec. at 612 (Reg. Comm. 1967), the CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the present matter, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonegawa*, *supra*, the petitioner's "personal service corporation" status is a relevant factor to be considered in determining its ability to pay. A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

As in the present case, substantially all of the stock of a personal service corporation is held by its employees, retired employees, or their estates. The documentation presented here indicates that [redacted] owns 100 percent of the company's stock. According to the petitioner's 2005 IRS Form 1120 Schedule E (Compensation of Officers), Ms. [redacted]r elected to pay herself $519,999. We note here that the compensation received by the company's other officer, [redacted] was $500,000.

CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

In the present case, however, counsel is not suggesting that CIS examine the personal assets of Ms. [redacted] but, rather, the financial flexibility that the employee-owner has in setting her salary based on the profitability of their personal service corporation medical practice. Clearly, the petitioning entity is a profitable enterprise for its owner. As previously noted, their firm earned a gross profit of $3,911,637 in 2005. We concur with the assertions presented by counsel on appeal. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owner confirms that the job offer is realistic and that the proffered salary of $54,787 can be paid by the petitioner.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other

relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2005 and subsequently. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.